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1-14-08

No._____

In The

Supreme Court of the United States

NATHANIEL QUARTERMAN, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division
Petitioner,

v.

FERNANDO GARCIA.
Respondent.

On Petition For Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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This is a capital case.

QUESTION PRESENTED

Graham v. Collins declined to "read Penry [v. Lynaugh, 492 U.S. 302 (1989) ("Penry I"),] to effect a sea change in the Court's view of the constitutionality of the . . . Texas death penalty statute." 506 U.S. 461, 474 (1993). And just last term, in Abdul-Kabir v. Quarterman, the majority responded to the concerns of the dissent that new sentencing trials would now be required in every case, pointing out that "in several instances, we concluded, after applying the relevant law, that the special issues provided for adequate consideration of mitigating evidence." 127 S. Ct. 1654, 1672 & n.20 (2007). But this only means that there was no constitutional error. What of the cases, and there have been many, where constitutional error was found? Each time that has happened, a new sentencing trial has been ordered without a second thought.

With but one exception, this Court has consistently determined that jury charge error is mere trial error. No exception has been made for death-penalty cases. Nor has an exception been carved out for those death-penalty cases where the flaw in the instructions somehow impacts the jury's ability to give a "reasoned moral response" to the defendant's mitigating evidence. That notwithstanding, the question whether of Penry error can be amenable to a harmless-error analysis has not been squarely answered by this Court. See Smith v. Texas, 127 S. Ct. 1686, 1699 (2007) ("Smith II") (Souter, J., concurring). Although it might seem surprising that this would still be an open question nearly twenty years after Penry I was decided, consider that until the last term, outside of Penry I and Penry v. Johnson, 532 U.S. 782 (2001) ("Penry II"), none of the cases to come before the

Court resulted in a finding of constitutional error; therefore, it was entirely unnecessary to reach the question of whether a harmless-error analysis would even be appropriate.

The lower court, however, has determined that Penry error — jury-charge error — is structural error. Nelson v. Quarterman, 472 F.3d 287 (5th Cir. 2006) (en banc), cert. denied, 127 S. Ct. 2974 (2007). But this simply cannot be reconciled with the Court's well-established jurisprudence. Further, this Court has expressly held that a finding of constitutional error does not end the inquiry. Mindful of the principles underlying habeas review and the high costs of retrial, the Court instructed that a harm analysis must follow. Calderon v. Coleman, 525 U.S. 141, 503-04 (1998) (per curiam). See also Yates v. Evatts, 500 U.S. 391, 402 (1991); Rose v. Clark, 478 U.S. 570, 586 (1986). In the instant case, the lower court, bound by its earlier — and incorrect — holding in Nelson, refused to consider whether the Penry error was harmless.

The lower court's decision gives rise to an important question:

> Penry error is found when the Texas special-issue questions, approved of in an unbroken line of cases spanning more than three decades, create a reasonable likelihood that the jury was unable to give meaningful effect to the defendant's mitigating evidence. The result being that the death sentence may not reflect the jury's reasoned moral response to the evidence. Does this mean that Penry error is never amenable to the harmless-error analysis of Brecht v. Abrahamson, 507 U.S. 619 (1993)?

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OPINION BELOW

The court of appeals reversed the district court's denial of habeas corpus relief and remanded with instructions to grant the writ on October 15, 2007. PA 1:1-13 (Garcia v. Quarterman, No. 03-11097, 2007 WL 3005213 (5th Cir. 2007) (op. on reh'g) (per curiam) (unpublished)).[1]

JURISDICTION

The Director's petition for writ of certiorari is timely filed on or before January 14, 2008.[2] Sup. Ct. R. 13.3 (West 2007). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

"Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted." U.S. Const. amend. VIII.

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[1] "PA" refers to the appendix to the instant petition for certiorari review. "Tr" refers the to transcript, the clerk's record of pleadings and documents filed in the trial court. "SF" refers to the "Statement of Facts," the reporter's record of transcribed trial proceedings. "SX" and "DX" refer to the State's exhibits and the defense exhibits, respectively, admitted into evidence during the trial. "SHTr" refers to the record of pleadings and documents filed during the state habeas proceedings.

[2] Because day ninety falls on Sunday, January 13, 2008, the time for filing a petition for writ of certiorari extends "until the end of the next day that is not a Saturday, Sunday, federal legal holiday, or day on which the Court building is closed." Sup. Ct. R. 30.1

STATEMENT OF THE CASE

I. Facts of the Crime

Garcia's guilt is not disputed. The evidence supporting the underlying capital-murder conviction was effectively summarized by the state court:

> The victim, three-year-old Veronica Rodriguez, was discovered missing sometime around 2:00 a.m. on Sunday, August 30, 1987, when her mother, Debbie Rodriguez, returned from an evening out with friends. After Rodriguez and Martin Barbosa [Rodriguez's fiancé] looked unsuccessfully around the house, they went out to the garage apartment where [Garcia] lived and asked if he had seen the child. [Garcia] replied that he had not, but would help them look for her. Before the three of them left to continue the search, [Garcia] padlocked the garage. Several hours later, the police were called. Officer Patrick Burke of the Dallas Police Department was dispatched to the residence at about 11:20 a.m. . . . to investigate the victim's disappearance. When Burke arrived he spoke with Rodriguez and Barbosa. He saw [Garcia] standing on the porch of the residence with two other men and, shortly thereafter, noticed [Garcia] walk off in an easterly direction. Burke conducted a walk-through search of the house and then proceeded to a nearby store to call his superiors[.]

Around 1:30 to 2:00 p.m., another patrol officer and Royce Dickey, a youth investigator, arrived at the home. By this time, Burke had conducted a thorough search of the house and canvassed the neighborhood, but still had not found the missing child. At this point, the officers expressed a need to look into the garage behind the house to determine whether the child might possibly have entered the structure somehow and then possibly been hurt. Barbosa told the officers that he owned both the house and the garage and that he had an agreement with [Garcia] that he could enter the garage whenever he wanted because he kept some of his property there. Barbosa then consented to the officers' search of the garage. However, Barbosa found that his key did not fit the padlock so he proceeded to break the door open. The officers conducted a cursory search of the garage including the inside of a refrigerator [because children sometimes hide inside them and become trapped]. Not finding anything on this initial search, Barbosa and the police exited the garage and continued the search elsewhere.

The youth division investigator, Dickey, returned to the residence the next morning, Monday, August 31[st], and asked Barbosa if he could search the garage. Again, Barbosa gave his consent. . . . [Garcia] had not been seen since the previous day when

> he allegedly agreed to aid in the search. When Dickey opened the garage door to initiate the second search, he smelled a familiar odor, leading him to believe a dead body was somewhere inside. On further investigation, Dickey found the body of the missing child wrapped in a blanket under [Garcia's] bed next to a wall of the garage. She had been sexually assaulted, beaten, and strangled. . . . [P]hotographs of the deceased take prior to the autopsy show[ed] bite marks and bruises[.]

Garcia v. State, 887 S.W.2d 846, 849-50 (Tex. Crim. App. 1994) (footnotes omitted).

II. The Punishment Trial

A. The State's case

The State's case on punishment focused on the gruesome crime and Garcia's prior criminal history. First, evidence was produced relating to a previous conviction for sexual abuse of a child. The victim was Diana Estrada, the five-year-old daughter of the woman Garcia was living with at the time, Rosa Maria Estrada. 20 SF 2709, 2746; 21 SF 2826-827, 2836-837, 2839-842; see also SX 92-93.[3] One afternoon, a neighbor, Estella Rangel, was at Garcia's apartment at the behest of

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[3] In addition to fondling the child and forcing her to perform oral sodomy on him, Garcia physically abused her, her mother, and her then eight year old brother, Roland Esquivel. 21 SF 2772, 2824-825, 2827-28, 2835

Diana's brother, to check on Diana. Rangel noticed that the little girl had "a lump as big as an egg . . . between her private part and her rectum." When Garcia arrived home and realized what was happening, he threatened Rangel by making a fist and coming toward her. 20 SF 2732, 2743-745. Rangel notified child welfare. Thereafter, whenever Garcia would see Rangel, he called her a snitch. 20 SF 2747; 21 SF 2856.

Caseworkers from the Texas Department of Human Services ("DHS") who were assigned to the case testified that Garcia denied any sexual or physical abuse, even after the allegations were confirmed by the victim. Indeed, Garcia characterized the allegations as "a big joke" and "ludicrous." He said further he would not have sexually abused anyone "because he was now a born-again Christian, that he was waiting for the rapture to come." 20 SF 2754; see also 21 SF 2770, 2779. However, he ultimately agreed to leave the home, as it was in Diana's best interest. 20 SF 2754-755, 2761. A subsequent visit revealed that Garcia was still living at the apartment. Although he insisted he had other living arrangements, he was evasive when asked to provide specific details. 21 SF 2768-770.

For this crime, Garcia was originally sentenced to probation.[4] On May 14, 1982, after only seven months,

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[4] This was over the negative report of the probation officer who evaluated Garcia and prepared the pre-sentence report. During the interview, Garcia admitted committing sexual abuse, but said "he was drunk . . . and did not realize what he was doing." 21 SF 2777. Garcia also admitted to routine marijuana use from ages thirteen to nineteen and "sniffing paint on a monthly basis from age 16 to 19." Probation was not recommended because the offense was heinous, Garcia continued to deny any wrongdoing, and his "prognosis for rehabilitation is extremely guarded to poor." *Id.* at 2779-781.

his probation was revoked, and Garcia was sentenced to two years in prison. 20 SF 2707-708; SX 92. Subsequently, on March 7, 1983, Garcia was released to parole, but he was again sent back to prison, this time after only two months, having committed the offense of burglary of habitation with the intent to commit sexual assault.[5] 20 SF 2707-10, 2714-718; SX 91, 94. In the early morning hours of April 28, 1983, Garcia broke into the apartment of George Merenue. Merenue's girlfriend was awakened by someone pulling at her shorts. She testified that she felt "somebody's tongue lapping on my buttocks," and the intruder "had his finger . . . in me." He tried to push her onto her back but ran away when Merenue awoke. 20 SF 2721-725.

For this crime, Garcia was sentenced to ten years in prison. 20 SF 2702; SX 91.[6] After serving three years, he was released to parole on July 1, 1986. 20 SF 2712; SX 94. Little more than one year later, on August 30, 1987, he would savagely attack and murder three-year-old Veronica Rodriguez. 20 SF 2712-13; see also SX 95.

The State ended its case with the testimony of Dr. Betty Schroeder. She had evaluated Garcia in 1981 at the request of the Bexar County Probation Office. 21 SF 2783-784. Initially, Garcia denied the charge of sexual abuse, "indicat[ing] he felt that the welfare people had brainwashed the child into making various accusations,

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[5] The charge was reduced to simple burglary in exchange for Garcia's guilty plea. *See* SX 91.

[6] Among the details revealed, the jury learned that Garcia had some adjustment problems. During an interview with a psychologist, Garcia said he was "disgusted and angry with blacks and others who engage in homosexual acts." 20 SF 2711-12; SX 94.

that they had actually coached the child into saying that he had sexually abused her."[7] Id. at 2786. As to his background, Garcia

> indicated that he was adopted at birth, and he never really knew his natural father. Apparently his grandparent's (sic) adopted him. His grandfather died prior to his birth. At that point, his adopted mother was 81 years old . . . and lived with his brother and subsisted on Social Security. Apparently he had two natural brothers, one natural sister.

Id. at 2785.

Garcia stated that he had dropped out of high school in the tenth grade. Id. Indeed, Dr. Schroeder testified that Garcia's "academic abilities were somewhat diminished." However, testing indicated he had above normal intelligence and an I.Q. of 110.[8] 21 SF 2786-787. Further, Garcia admitted to Dr. Schroeder that he had smoked marijuana and sniffed spray paint in the past, but insisted that he had not done either for the six months prior to November, 1981. She testified that his drug use, nevertheless, "strongly suggested some addictive propensities." Id. at 2785-787.

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[7] Garcia made a similar accusation to one of the caseworkers, saying he felt like someone "had gotten to the children." 20 SF 2770-771.

[8] On cross-examination, Dr. Schroeder opined that Garcia "probably could have achieved much more had he stayed in school and had some encouragement in that direction." 21 SF 2796.

Finally, Dr. Schroeder testified that Garcia was a pedophile, "an individual who resolves his sexual excitation, his urges for sex mainly through the use of small children, fondling to actual sexual intercourse[.]" 21 SF 2792; see also id. at 2802-803. Because of this, she concluded that Garcia's prognosis for rehabilitation was "extremely guarded to poor. . . .

> Individuals who are pedophiles, in fact, any kind of a psychiatric/psychological pathology that emerges from the basic human primary drives such as the drive to eat, drink, have sex, . . . one of the primary human drives, are very, very resistant to change. Even the best of psychotherapists, behaviorists, all the range of individuals find it very difficult to penetrate and aid the individual dealing with this kind of pathology.

21 SF 2790-791; see also id. at 2805. She said that in prison, where presumably he would have no contact with children,[9] Garcia would find other ways of expressing his pedophiliac urges, through "fighting, viciousness, anger, depression." Id. at 2805.

B. The defense's case

The defense's case in mitigation began with the cross-examination of Dr. Schroeder. On cross-examination, she testified that Garcia "did not have the

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[9] Dr. Schroeder admitted that Garcia could, theoretically, have access to children despite being incarcerated because children were allowed face-to-face visits. 21 SF 2808.

usual nurturing [the love and discipline that a father and a mother give to a child] that one would hope that a young child would have and did not have the kind of encouragement toward formal education." 21 SF 2794. Additionally, she elaborated on Garcia's level of achievement in school, stating that he read at a sixth-grade level, and his math skills were that of a fifth grader. Id. at 2796. Dr. Schroeder opined that Garcia had only reached the tenth grade as a result of having been socially promoted from grade to grade. Id. at 2798.

Dr. Schroeder also discussed the side effects of inhalant abuse, testifying that she had observed erratic and psychotic behavior in teenagers who had engaged in such behavior. She said the chemicals that are ingested attack the neurological system and often cause permanent and irreversible damage. Id. at 2799-800. Further, she admitted having more hope that someone who was both a substance abuser and a pedophile could be rehabilitated because oftentimes, such a person would not act on his impulses unless intoxicated. Id. at 2801. Ultimately, Dr. Schroeder said that her "experience has been that sociopaths, psychopathic personalities such as this tend to conform well to the structure of the penal system and usually do not commit other violent acts within this particular structure." Id. at 2807.

In its case-in-chief, the defense re-called Estella Rangel. She knew Garcia because the two had lived in the same housing project; however, she did not get to know him until he began living with Rosa Estrada. Id. at 2847-849. Rangel described seeing Garcia dressed as a woman on several occasions in 1979. She said that on those occasions, Garcia would get into a waiting car where he and the driver, another man, would kiss. Id. at

2849-851. Additionally, Rangel testified that she had seen Garcia sniffing paint more than once. Specifically, she had seen him doing this before he would abuse Rosa's daughter.[10] Id. at 2853.

The defense also called its own expert to testify, Dr. Robert Powitzky. At the outset of his testimony, he agreed with Dr. Schroeder's diagnosis that Garcia was a pedophile. Id. at 2861; see also id. at 2875. But the family history Garcia described to Dr. Powitzky differed markedly from that he had given to Dr. Schroeder:

> [H]e was abandoned by his mother to be adopted by his grandmother.
> They . . . didn't really abuse him, but pretty well neglected him and pretty well ignored him and also exposed him to some witchcraft and other kinds of bizarre . . . experiences.
>
> When his mother would come to visit him, she would take him away. As far back as he could remember, on occasion she would come back and would get herself and him and her boyfriend intoxicated, and they would all have sex together. First it started with him just being in the bed while they were having sex, and graduated to where they all were sexual together.

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[10] Rangel had testified for the State that she had witnessed Garcia abuse Diane Estrada on several occasions, but she was afraid of saying anything or intervening "because he was on spray." 20 SF 2746.

> And he was forced to perform oral sex at the age of five on his older brother's friend, forced by his older brother at the age of six to perform oral sex. Abused . . . at the age of eight by a [fourteen-year-old] cousin, a female cousin, who had him perform oral sex on her. Third grade was taken for a few weekends by a nun that ostensibly convinced the grandmother that she wanted to help him with confirmation class. And . . . she sexually abused him for a couple of weekends.

Dr. Powitzky admitted he was unable to verify any of this information. Id. at 2861-863. Nevertheless, he explained that male victims of sexual abuse tend to react by acting out, reclaiming the power after the "total helplessness of being sexually abused by someone . . . trusted and loved as a child." Id. at 2867. He also said rage is very common, as is confusion about sexual identity. Id.

While he believed Garcia would be a danger to free society, because he would once again turn to drugs and alcohol and in turn, probably abuse more children, Dr. Powitzky did not believe Garcia would be a threat to prison society. Id. at 2869. Prison records indicated Garcia had not had any major disciplinary problems during his prior incarcerations.[11] Moreover, he opined that when Garcia was sober, and presumably he would be sober in prison, "he's much, much less of a danger to anybody." Finally, like Dr. Schroeder, Dr. Powitzky

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[11] Notably, however, Garcia was disciplined for possession of contraband: three tubes of glue. When asked for an explanation, Garcia contended that the glue was not "toxic." *See* SX 91.

explained that his experience indicated "that pedophiles tend to be the more passive and the, quote, the better behaved inmates." Id. Indeed, he explained that Garcia would probably be the one in danger in prison. Id. at 2871; see also id. at 2880, 2882. Dr. Powitzky did not believe Garcia would abuse "a fresh-faced 18 year old boy that looks like he's about 10" if prison officials were to place such an inmate with him because his preferred victims were young girls. Id. at 2881, 2882.

Ultimately, Garcia admitted to him that he had sexually abused Rosa Estrada's five-year-old daughter by forcing her to perform oral sex on him. Id. at 2864. As to the burglary charge, however, Dr. Powitzky testified that "Garcia had . . . minimized that. He sort of said, 'I was drunk and sort of stumbled into a bed. There was a woman in it, and she screamed rape.'" Id. at 2865. And regarding the facts of this offense, on cross-examination, Dr. Powitzky testified that Garcia "stated that he only had flashes of memory of that, that he recalled only taking the girl from the house. Basically, he recalled being on top of her. The next thing he could remember was waking up and finding her in bed with him and putting her under the bed."[12] Id. at 2876.

At the conclusion of its case, the defense offered into evidence Garcia's school records, medical records pertaining to an attempted suicide, and selected records of his prior incarcerations and the parole board. Id. at

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[12] But he denied committing the murder entirely in a conversation with Rosa Estrada, telling her that he had been "in a very smart organization which the only way I could get out is dead. But they did frame me with this murder. It's going to be very hard for me to prove otherwise." 21 SF 2878-879; SX 105, DX 3

2888; DX 1-2, 5-6.

C. The jury charge

Pursuant to state law, Garcia's jury was charged with answering two special issue questions:

> Was the conduct of the defendant that caused the death of the deceased committed deliberately and with the reasonable expectation that the death of the deceased or another would occur?[13]
>
> Is there a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society?[14]

Tr 198-99; see Tex. Code Crim. Proc. art. 37.071 (West 1987). The trial court also provided the jury with a supplemental instruction:

> You are instructed that you shall consider any evidence which, in your opinion, mitigates against the imposition of the death penalty. In making this determination you shall consider any aspects of the defendant's background, character or record and the facts and circumstances of the offense. If you believe from the evidence that the State has proven

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[13] This is the "deliberateness" special issue.

[14] This is the "future dangerousness" special issue.

> beyond a reasonable doubt that the answers to the Special Issues are "Yes," but you are further persuaded by the mitigating evidence that the defendant should not be sentenced to death in this case, or you have reasonable doubt as to whether the death penalty should be imposed against the defendant, then you shall answer one or both of the Special Issues "No" in order to give effect to your belief that the death penalty should not be imposed in this case.

Tr 199-200.[15]

D. Arguments of counsel

The State's sole concern was convincing the jury that they had proven both deliberateness and future dangerousness beyond a reasonable doubt. See 21 SF 2903-911, 2927-928, 2930-933. As to deliberateness, the State argued in part:

> After everybody went to bed, after quietness had settled like a fog over a river, [Garcia] walks through the front door. He didn't bust out a window trying to hop through the window. He didn't continuously clang on the back door trying to get in that door because he knew it was locked. He walked in that front door. Martin Barbosa's right there on the couch asleep. Walked back to where he knew [Veronica] would be and

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[15] This instruction is substantially similar to the "nullification instruction" at issue in *Penry v. Johnson*, 532 U.S. 782 (2001) ("*Penry II*").

> picked her up. Opened and unlocked the back door, closed it and locked it from behind, and took her to only where he knew they would be alone.
>
> Not like some crazy mad man hollering and bumping the walls and raping the victim just wherever he finds the victim. He took [Veronica] back, and you know what he did to her under the blanket regardless.
>
> That's deliberation. Not an accident. Not a mistake. He just didn't stumble into that place, and it just happened right there. He did what he wanted to do, and he wanted to do what he did.

Id. at 2904.

And as to future dangerousness, the State summarized the numerous chances Garcia had been given to become a productive member of society, emphasizing that "he has manipulated the system all down the line, and he has scratched every person's back that could help him or hurt him." Id. at 2909.

Defense counsel's argument, while inartful, makes plain that the theory of punishment case was to make the jury understand that Garcia had not acted deliberately:

> We are asking you in question [number one] what his state of mind was. Did he do this act deliberately? We told you it wasn't premeditated, didn't mean premeditated. We told it meant more than

intentional. That is the guidance we gave you. What else could it be if it's not deliberate? I don't know. I can't make any sense out of this crime.

At what point on that night did Fernando Garcia decide to end poor Veronica's life. At what point did he say to himself that she must die. There are so many different ways one human being can be inhumane to another. I don't want to list them and describe them or go through them.

I want to look at what Fernando had done in the past. We know that Fernando had sexually abused children before, little girls. We know that Fernando had hit women, beaten Rosa, hit and beaten young boys, Roland, hit and beaten little girls. At what point when he was hitting or strangling poor Veronica, did he decide she must die? I don't know. You are going to have answer that based on what you know. Did he do it deliberately? Does he do anything deliberately?

Well, you have deliberated in this case. You have done something deliberately. You have sat and sifted through the evidence, looked at things and come up with a conclusion. You have deliberated.

Did he deliberate that night? Did he perform his awful sexual act on her and sit

> down and decide what to do, and then decide that she must die? He had never done that before. He had hit other children that had not died. He had suffocated Rosa's children. They had not died.
>
> When did he decide? When did he deliberate? Only you can answer that question.

21 SF 2919-920.

III. Direct Appeal and Postconviction Proceedings

Garcia was convicted of capital murder and sentenced to death for the vicious sexual assault and murder of three-year-old Veronica Rodriguez. His conviction and sentence were affirmed on direct appeal by the Texas Court of Criminal Appeals. Garcia v. State, 887 S.W.2d 846, cert. denied, 514 U.S. 1005 (1995). Addressing Garcia's claim that the jury instructions were constitutionally inadequate under Penry I, the court held that because he had received a "Penry" instruction that directed the jury to consider the defendant's character and background in determining whether to impose life or death, Garcia was not entitled to any additional instructions. Id. at 860.

Garcia reasserted his Penry claim during the state habeas proceedings. The state habeas court concluded that even with the supplemental instruction, there was not "a reasonable likelihood that the jury interpreted [its] instruction[s] in such a way that prevent[ed] the consideration of . . . relevant mitigating evidence." SHTr 114 (citing Boyde v. California, 494 U.S. 370 (1989);

Johnson v. Texas, 509 U.S.350, 367-68 (1993)). After adopting the findings and conclusions of the trial court, the Court of Criminal Appeals denied Garcia's application for a state writ of habeas corpus. Ex parte Garcia, No. 45,875-01 (Tex. Crim. App. 2001) (unpublished order).

IV. Federal Habeas Corpus Proceedings

In his petition for federal habeas relief Garcia again alleged, inter alia, that the trial court's instructions prevented the jury from considering and giving effect to his mitigating evidence. After adopting the magistrate judge's finding that Garcia's evidence was not "constitutionally relevant" because he had not established a "uniquely severe permanent handicap," the district court denied relief. Garcia v. Dretke, No. 3:01-CV-580-G (N.D. Tex. 2003) (citing Robertson v. Cockrell, 325 F.3d 243 (5th Cir. 2003) (en banc)). But based on this Court's grant of certiorari review in Smith v. Dretke, 539 U.S. 986 (2003),[16] and Tennard v. Dretke, 540 U.S. 945 (2003), Garcia was granted a certificate of appealability on the single issue of whether "the trial court violated [his] federal constitutional rights under the Eighth and Fourteenth Amendments by charging the jury with a 'nullification' instruction which failed to give effect to [his] mitigating evidence."

Thereafter, this Court issued its opinion in Tennard v. Dretke, 542 U.S. 274 (2004). Tennard dismantled the "constitutional relevance" test employed by the district court and established by the Fifth Circuit,

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[16] When the State commuted Smith's sentence, the petition was dismissed as moot. *Smith v. Dretke*, 541 U.S. 913 (2004)

holding that it "has no foundation in the decisions of the Court. Neither Penry I nor its progeny screened the mitigating evidence for 'constitutional relevance' before considering whether the jury instructions comported with the Eighth Amendment." 542 U.S. at 284. The Court then emphasized that mitigating evidence presented in a capital case need only be relevant, that is, if the evidence has "'any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without it,'" it is relevant. Id. (quoting McKoy v. North Carolina, 494 U.S. 433, 440-41 (1990) (internal quotation marks and citation omitted)).

After a thorough review of the evidence, the lower court's original opinion affirmed the denial of federal habeas relief:

> We are presented here with a situation in which the defense counsel's theory of the case was that the evidence should be considered for its relevance under the deliberateness special issue and not for additional mitigating effect. On habeas review, the petitioner argues that the special issues limited the jury's ability to give mitigating effect to the evidence, but it was defense counsel's theory that imposed the limits on the jury. Because the jury was able to give effect to the evidence as presented, there is no Penry violation. Our holding is a narrow one, specific to the facts of this case where defense counsel did not present the evidence for its mitigating effect and instead expressly asked the jury not to

> sympathize with Garcia. Contrary to the dissent's somewhat hyperbolic suggestions, we do not hold that relevant mitigating evidence should be ignored, nor that a mitigation theory is even required. We do, however, believe we are required to review the case was actually presented to the jury.

PA II: 18-19 (Garcia v. Quarterman, 456 F.3d 463, 472 (5th Cir. 2006)).

While the case was pending on rehearing, this Court decided Abdul-Kabir v. Quarterman, 127 S. Ct. 1654, and Brewer v. Quarterman, 127 S. Ct. 1706 (2007). In those cases, the Court held that Penry error occurs when there is a reasonable likelihood a jury is not permitted to give "meaningful effect" or a "reasoned moral response" to a defendant's mitigating evidence. Abdul-Kabir, 127 S. Ct. at 1675; Brewer, 127 S. Ct. at 1710, 1712. The Court noted that "[t]he former [Texas] special issues provided an adequate vehicle for the evaluation of mitigating evidence offered to disprove deliberateness or future dangerousness." Abdul-Kabir, 127 S. Ct. at 1670. The special issues can also satisfy the Eighth Amendment "when mitigating evidence has only a tenuous connection — 'some arguable relevance' — to the defendant's moral culpability." Id. at 1668 n.14. However, Abdul-Kabir explained that the "evidence of childhood deprivation and lack of self-control did not rebut either deliberateness or future dangerousness but was intended to provide the jury with an entirely different reason for not imposing a death sentence," i.e.,"his violent propensities were caused by factors beyond his control -- namely, neurological damage and childhood neglect and abandonment." Id. at 1661, 1672.

Similarly, "Brewer's mitigating evidence served as a 'two-edged sword' because it tended to confirm the State's evidence of future dangerousness as well as lessen his culpability for the crime." Brewer, 127 S. Ct. at 1712.

Further, the special issues failed in Abdul-Kabir because they were "undermined" by prosecutorial argument "that the law compels [the jury] to disregard the force of evidence offered in mitigation." 127 S. Ct. at 1673. The Brewer opinion reached the same conclusion. While Brewer's mitigating evidence lessened his culpability for the crime, it also tended to confirm the State's evidence of future dangerousness because the prosecutor urged the jury to "disregard[] any independent concern that, given Brewer's troubled background, he may not be deserving of a death sentence." Brewer, 127 S. Ct. at 1712. Thus, "a juror considering [Abdul-Kabir]'s evidence . . . or Brewer's evidence of mental illness, substance abuse, and a troubled childhood could feel compelled to provide a 'yes' answer to the [future dangerousness] question, finding himself without a means for giving meaningful effect to the mitigating qualities of such evidence," rather than "accept the suggestion . . . that his brief spasm of criminal activity . . . was properly viewed . . . as an aberration that was not likely to be repeated." Abdul-Kabir, 127 S. Ct. at 1673 & n.23 (emphasis in original). It was this overly aggressive prosecutorial argument that distinguished Abdul-Kabir and Brewer from Johnson v. Texas and Graham v. Collins, 506 U.S. 461 (1993). Id.

In light of these opinions, the court below reversed the denial of habeas relief, granted the writ and remanded for a new sentencing trial. PA 1:2, 13. The court determined that the instructions given in this case

may not have allowed the jury to give meaningful effect to Garcia's mitigating evidence of substance abuse and neglect and abuse during childhood.[17] PA I:9-12. In conclusion, the lower court noted that Brecht's harmless-error analysis governs "virtually all" other collateral challenges to state court convictions, but whether "some types of Penry error" come under that umbrella was an open question. PA I: 12-13.

REASONS FOR GRANTING THE WRIT

Constitutional error is not, and should not be, taken lightly. Even more so in the context of a death-penalty case. But this Court has never shied away from allowing harmless-error analysis in those cases, even where as here, the flaw in the instructions can be construed as creating a reasonable likelihood that the jury was precluded from considering and giving effect to the defendant's mitigating evidence.

Over twenty-one years ago, Garcia visited unspeakable horrors on three-year-old Veronica Rodriguez. He had a constitutionally fair trial that resulted in the imposition of the death penalty. In the time that he has been on death row, this Court has determined that the instructions given to his jury at the close of the punishment trial can violate the Eighth Amendment. This is so because in some cases, the jury

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[17] The court did conclude, however, that Garcia's good character evidence — that he was a born-again Christian and had not had any serious problems during previous incarcerations — was clearly within the purview of the future-dangerousness special issue. PA I: 9-10 (citing *Abdul-Kabir*). The lower court also again rejected Garcia's argument that his diagnosis as a pedophile was in any way mitigating and stated that it "does not meet even the low threshold of relevance set by [*Tennard*]." PA I: 9 n.5.

is unable to give meaningful effect to certain types of mitigating evidence; thus, the death sentence would not necessarily reflect the jury's "reasoned moral response." But underlying this "moral response" is nothing more than the jury's determination that, at the end of the day, the mitigating evidence did not outweigh the aggravating evidence. Regardless, as between trial error and structural error, this jury-charge error is simple trial error, and as such, it is amenable to harmless-error analysis.

In the instant case, the lower court applied Abdul-Kabir and Brewer to find the jury might have been precluded from considering and giving effect to Garcia's mitigating evidence of substance abuse and childhood abuse and neglect. Then bound by the holding of Nelson — and in clear contravention of this Court's precedents — it made no determination of harm. But as the record fairly shows, in this case, the constitutional error did not have a "substantial and injurious effect or influence" on the verdict.

I. A Determination of Penry Error Rests on a Finding that there Exists a Reasonable Likelihood the Jury was Precluded from Considering and Giving Effect to the Defendant's Mitigating Evidence. Such Jury-Charge Error Can Only be Trial Error, Thus Giving Rise to the Question of Harmlessness.

It has long been settled that "trial error" is that which has "occurred during the presentation of the case to the jury, and . . . may therefore be qualitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless."

Arizona v. Fulminante, 499 U.S. 279, 207-08 (1991). The Fulminante Court recognized that "most constitutional errors can be harmless." Id. at 306. See also United States v. Gonzalez-Lopez, 126 S. Ct. 2557, 2564 (2006). And as the Court explained in Neder v. United States, "'[i]f the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other constitutional errors that may have occurred are subject to harmless-error analysis.'" 527 U.S. 1, 8 (1999) (quoting Rose, 478 U.S. at 579); see also id. at 9.

Structural defects, on the other hand, are different and exceedingly rare because, with those errors, "[t]he entire conduct of the trial from beginning to end is . . . affected." Fulminante, 499 U.S. at 309-10. In this way, then, structural defects "'defy analysis by "harmless-error" standards' because they "affec[t] the framework within which the trial proceeds," and are not 'simply an error in the trial process itself.'" Gonzalez-Lopez, 126 S. Ct. at 2564 (quoting Fulminante, 499 U.S. at 309-10) (alterations in original). Indeed, the Court has only found structural error in six discrete instances. See Tumey v. Ohio, 273 U.S. 510 (1927) (biased trial judge); Gideon v. Wainwright, 372 U.S. 335 (1963) (denial of counsel); Vasquez v. Hillery, 474 U.S. 254 (1986) (racial discrimination in grand-jury selection); McKaskle v. Wiggins, 465 U.S. 168 (1984) (denial of self-representation at trial); Waller v. Georgia, 467 U.S. 39 (1984) (denial of public trial); Sullivan v. Louisiana, 508 U.S. 275 (1993) (defective reasonable-doubt instruction). As the Court concluded in Rose:

> Placed in context, the erroneous . . . instruction does not compare with the kinds of errors that automatically require reversal

> of an otherwise valid conviction . . . [because] the error in this case did not affect the composition of the record. Evaluation of whether the error prejudiced [the defendant] thus does not require any difficult inquiries concerning matters that might have been, but were not, placed in evidence. Consequently, there is no inherent difficulty in evaluating whether the error prejudiced respondent in this case.

478 U.S. at 579-80 & n.7 (citations omitted).

A. This Court has nearly unequivocally held jury-charge error to be trial error.

Consistent with these principles, most jury-charge errors have been held to be trial errors subject to harmless-error analysis. See Washington v. Recuencco, 126 S. Ct. 2546 (2006) (failure to submit sentencing factor to jury); Mitchell v. Esparaza, 540 U.S. 12 (2003) (per curiam) (instruction omitted element of offense); Neder (instruction omitted element of offense); Calderon v. Coleman, 525 U.S. 141 (1998) (misleading jury instruction); Clemmons v. Mississippi, 494 U.S. 738 (1990) (state court invalidated aggravating factor as a matter of state law after the verdict); Carella v. California, 491 U.S. 263, 266 (1989) (erroneous conclusive presumption in jury instruction); Pope v. Illinois, 481 U.S. 497, 501-04 (1987) (jury instruction contained wrong constitutional standard); Rose (instruction improperly shifted burden of proof on element of crime). But see Sullivan (improper definition of "beyond a reasonable doubt" nullifies verdict and results in structural error).

Garcia's jury was charged according to state law at the time of his trial: the special issues asked the jury to consider Garcia's future dangerousness and the deliberateness of his actions. Additionally, Garcia's jury, having been empaneled shortly after Penry I was decided, was given the supplemental instruction later found to be an inadequate remedy in Penry II. This is classic jury charge error. See Smith II, 127 S. Ct. at 1699 (Alito, J., dissenting) ("The federal constitutional error that occurred in the penalty phase of petitioner's trial and that was identified in Smith v. Texas, 543 U.S. 37 [] (2004) (per curiam) [], concerned a flaw in the jury instructions[.]"). As such, it is properly classified as trial error.

B. That Penry error arises in the context of death penalty case does not magically transform such garden-variety trial error into structural error.

This Court's Eighth Amendment jurisprudence demands that a capital sentencing jury not be precluded from considering, as a mitigating factor, the character and record of the individual offender, as well as the circumstances of the particular offense. This ensures that the jurors will be able to give their "reasoned moral response" to the defendant's mitigating evidence. E.g., Penry II, 532 U.S. 782; Penry I, 492 U.S. 302; Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, 438 U.S. 586 (1978) (plurality op.). In Texas, when the jury is so precluded, this gives rise to Penry error. But the Court has not hesitated to find these types of jury instruction problems amenable to harmless-error analysis. The lower court, on the other hand, has carved a new

exception out of whole cloth: "moral judgements" are not subject to harmless-error review. Nelson, 472 F.3d at 314-15 & n.8.

In a major departure from this Court's general rule that jury-charge error is trial error, even where the death penalty has been imposed, the court below suggests that Penry error should be structural error. Id. Nelson relied principally on the absence of any harm analysis — and the lack of any suggestion that harm analysis might be appropriate — from the Penry line of cases. Id. at 314 (citing Tennard, 542 U.S. 274; Penry II, 532 U.S. 782; Penry I, 492 U.S. 302). This absence, the court explained rests on

> the recognition that Penry error deprives the jury of a "vehicle for expressing its 'reasoned moral response' to the defendant's background, character and crime," which precludes it from making "'a reliable determination that death is the appropriate sentence.'" Penry II, 532 U.S. at 797 [] (quoting Penry I, 492 U.S. at 328 []) (internal quotation marks omitted) (emphasis added). This reasoned moral judgment that a jury must make in determining whether death is the appropriate sentence differs from those fact-bound judgments made in response to the special issues.

Id. at 314-15 (emphasis in original).

As an initial matter, the absence of something does not make the opposite true. That aside, in deciding as it

did, the lower court wholly ignored that the "reasoned moral response" is nothing more than a factual determination that, in the minds of the jurors, the defendant's mitigating evidence did not overcome whatever aggravating factors were at play, including but not limited to, the facts of the crime and the defendant's prior criminal history. Especially instructive is this Court's determination that Hitchcock[18] error can be harmless. See Singletary v. Smith, 507 U.S. 1048 (1993) (granting certiorari and remanding to appellate court in light of recent opinion in Brecht).

At issue in Hitchcock was a Florida statute limiting the mitigating circumstances a jury or judge could consider to only those enumerated. 481 U.S. at 395-96. While defense counsel argued to the jury that "it was to 'look to the over picture . . . consider everything together . . . consider the whole picture, the whole ball of wax," the prosecutor insisted that the jury was to "consider the mitigating circumstances and consider those by number.'" Id. at 398 (internal citations omitted). Further, the trial judge instructed the jurors that they were to consider only those aggravating and mitigating circumstances as allowed for by state law. Id. This violated the Eighth Amendment:

> We think it could not be clearer that the advisory jury was not instructed to consider, and the sentencing judge refused to consider, evidence of nonstatutory mitigating circumstances, and that the proceedings therefore did not comport with the requirements of Skipper v. South

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[18] *Hitchcock v. Dugger*, 481 U.S. 393 (1987).

> Carolina, 476 U.S. 1 [] (1986), Eddings v. Oklahoma, 455 U.S. 104 [], and Lockett v. Ohio, 438 U.S. 586 [].

Id. at 398-99. No meaningful difference exists between the law invalidated in Hitchcock and the Texas special issues found to be inadequate in Penry I, Abdul-Kabir, and Brewer.

C. The conclusion that the jury instructions created a reasonable likelihood of misapplication does not end the inquiry.

When a claim involves jury instructions in capital-sentencing proceedings, the relevant inquiry is whether there is a reasonable likelihood the jury applied them in such a way that precluded consideration of the defendant's mitigating evidence. Boyde, 494 U.S. at 380; see also Abdul-Kabir, 127 S. Ct. at 1673-674; Smith II, 127 S. Ct. at 1698; Estelle v. McGuire, 502 U.S. 62, 72 & n. 4 (1991); Nelson, 472 F.3d at 311. In its original opinion, the lower court noted that this analysis unnecessary. PA II: 18 n.13 (Garcia v. Dretke, 456 F.3d at 472 n.13). No mention of this analysis at all was made in the opinion on rehearing. PA I: 1-13.

But as Calderon explained, even where a Boyde analysis has been made, a federal habeas court must go one step further:

> Although the Boyde test for constitutional error, like the Brecht harmless-error test, furthers the "strong policy against retrials years after the first trial where the claimed

> error amounts to no more than speculation." 494 U.S. at 380 [], it is not a substitute for the Brecht harmless-error test. The Boyde analysis does not inquire into the actual effect of the trial error on the jury's verdict; it merely asks whether constitutional error has occurred.

525 U.S. 146-47.

This Court has been very clear when concluding constitutional error required automatic reversal. See, e.g., Gonzalez-Lopez, 126 S. Ct. at 2564 ("[E]rroneous deprivation of the right to counsel of choice, . . . qualifies as 'structural error.'"); Sullivan, 508 U.S. at 281-82 (denial of trial by jury due to a defective reasonable doubt instruction "unquestionably qualifies as structural error"); Vasquez, 474 U.S. 263-64 ("[D]iscrimination in the grand jury undermines the structural integrity of the criminal tribunal itself, and is not amenable to harmless-error review."). But with respect to Penry error, no such suggestion, much less a plan statement, has ever been made despite numerous opportunities to do so. For good reason: because Penry error, like all other trial errors, does not require automatic reversal and is thus subject to harmless-error analysis.

II. In spite of the Penry Error in this Case, the Record Does Not Support a Finding that the Error had a "Substantial and Injurious Effect or Influence" on the Verdict.

Brecht v. Abrahamson mandates that the standard of review for harm should be "whether the error 'had a substantial and injurious effect or influence in

determining the jury's verdict.'" 507 U.S. at 637 (quoting Kotteakos v. United States, 328 U.S. 750, 776 (1946)). See also Fry v. Pliler, 127 S. Ct. 2321 (2007). This means that "a harmlessness finding requires 'fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error.'" Id. at 2330. (Stevens, J., concurring in part and dissenting in part) (quoting Kotteakos, 328 U.S. at 765).

The policies underlying Brecht's harmless-error standard are "the State's interest in the finality of convictions," comity, and federalism during collateral review. 507 U.S. at 635. Where Penry error would result in a new sentencing trial after nearly twenty years, the interests of justice certainly warrant application of Brecht. Granting habeas relief after so long merely because there is a reasonable likelihood the jury's verdict was negatively affected by a now-repealed sentencing statute is "at odds with the historic meaning of habeas corpus — to afford relief to those whom society has 'grievously wronged.'" Id. at 637. Such a decision has significant societal costs, "including the expenditure of additional time and resources for all the parties involved, the 'erosion of memory' and 'dispersion of witnesses' that accompany the passage of time and make . . . retrial more difficult, and the frustration of 'society's interest in the prompt administration of justice.'"[19] Id. (quoting United

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[19] Similarly, a cost-benefit analysis is part of any analysis under *Teague v. Lane*, 488 U.S. 289 (1989). And the Court has found that the costs of retroactive application generally, and almost certainly will outweigh the benefits. *See Sawyer v. Smith*, 497 U.S. 227, 242-43 (1990); *see also McKlesky*, 499 U.S. at 490 (observing that when a habeas petitioner is granted a new trial, the "erosion of memory and dispersion of witnesses that occur with the passage of time prejudice the government and diminish the chances of a

States v. Mechanik, 475 U.S. 66, 72 (1986)). Therefore, the interests of justice — finality, comity, and federalism — strongly favor consideration of whether any Penry error had a "substantial and injurious effect or influence" on the verdict."[20] Id.

In the instant case, there is no doubt the instructions given to the jury were unconstitutional under both Penry I and Penry II. But the state courts did not recognize the constitutional error, much less apply any sort of harm analysis. The Fry Court explained it is nevertheless the duty of the federal habeas court to conduct a harm analysis. 127 S. Ct. at 2328. Even so, the lower court did not conduct a harm analysis because whether such is applicable where there is Penry error has not been decided by this Court. It is nevertheless appropriate for this Court to consider whether the Penry error in this case was harmless. See Yates, 500 U.S. at 407 ("[W]e have the authority to make our own assessment of the harmlessness of a constitutional error in the first instance.") (citation omitted); Rose, 478 U.S. at 407 ("[W]e 'plainly have the authority' to decide whether, on the facts of a particular case, a constitutional error is harmless under the Chapman [v. California, 386 U.S. 18 (1967)] standard.") (citing United States v.

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reliable criminal adjudication." (citation omitted)). In this context, habeas review "disturbs the State's significant interest in repose for concluded litigation, denies society the right to punish some admitted offenders, and intrudes on state sovereignty to a degree matched by few exercises of federal judicial authority." *Duckworth v. Egan*, 492 U.S. 195, 210 (1989) (O'Connor, J., concurring).

[20] Importantly, the *Nelson* court did not even pay lip service to the concerns and principles on which the harmless error analysis relies. 472 F.3d at 314-15; *see also id.* at 331-37 (Dennis, J., concurring and assigning additional reasons).

Hastings, 461 U.S. 499, 510 (1983)).

Here, the evidence established that Garcia physically and sexually assaulted children and adults alike. His proclivities affected those he lived with and complete strangers, too. Garcia lied and made myriad excuses for the abuse; he was a recidivist devoid of remorse. Most disturbing, however, was the apparent escalation of his urges toward little girls. He sexually abused five-year-old Diana Estrada in a manner heinous enough to produce a "lump as big as an egg . . . between her private part and her rectum." And then having been given a place to stay by Veronica's mother and her fiancé, Garcia repaid that act of kindness by mauling the three-year-old, coolly abducting her in the middle of the night to sexually abuse her. Veronica suffered thirteen bite marks over her tiny body and a savage beating before she was strangled to death. No claims of being a born-again Christian could diminish that. No addiction to inhalants or alcohol could soften the impact. Nor could any evidence of childhood abuse or neglect. Assuming, as we must, that the jury considered this evidence, it would doubtless be offset by the source (Garcia alone in almost every instance), quality (completely uncorroborated hearsay), and quantity (scant little).

This Court has placed special emphasis on the fact that Texas juries are aware of the consequences of their actions and are thus "likely to weigh mitigating evidence as it formulates these answers in a manner similar to the one employed by capital juries in 'pure balancing states.'" Johnson, 509 U.S. at 370-71 (quoting Franklin v. Lynaugh, 487 U.S. 164, 182 n.12 (1988) (plurality op.)). Garcia's jury was likewise aware, as it was instructed that an affirmative answer to both special issues would

result in the imposition of the death penalty and a negative answer to one would result in a life sentence.

The responsibility foisted upon jurors in a capital murder trial is serious. We cannot blithely assume they do not take it seriously. The Lockett Court presumed that "'jurors . . . confronted with the awesome responsibility of decreeing death for a fellow human [would] act with due regard for the consequences of their decision.'" 438 U.S. at 598 (quoting McGautha v. California, 402 U.S. 183, 208 (1971)). Nothing in the record suggests the jury in this case acted in a contrary manner. And ultimately, even taking into account the flawed special issue questions and the inadequate supplemental instruction, nothing in the record suggests that the death sentence imposed reflects something less than the jury's "reasoned moral response." The Eighth Amendment was thus not offended.

CONCLUSION

For the foregoing reasons, this Court should grant the Director's petition for writ of certiorari.

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